

2003

# David McCullough v. Ken Fox : Brief of Defendant/Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DAVID McCULLOUGH,	)	
	)	
Plaintiff and Appellee,	)	
	)	
vs.	)	Case No. 20030185-CA
	)	
	)	
KEN FOX,	)	Priority No. _____
	)	
Defendant and Appellant	)	

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BRIEF OF DEFENDANT/APPELLANT

---

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT  
STATE OF UTAH, THE HON. SANDRA N. PEULER, PRESIDING

---

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Attorney for Plaintiff/Appellee

Requests Oral Argument and a Published Opinion

**FILED**  
Utah Court of Appeals

AUG 22 2003

Faulette Stagg  
Clerk of the Court

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LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the undersigned counsel for Defendant/Appellant represents that the named parties, David McCullough and Ken Fox are and have been the only parties to this litigation.

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BRIEF OF DEFENDANT/APPELLANT

---

JURISDICTIONAL STATEMENT

Jurisdiction of the Third Judicial District Court, Salt Lake County, State of Utah, from which this appeal arises, is based on U.C.A. 78-3-4(1) (1953), (as amended).

Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court pursuant to Article VIII, Section 5 of the Constitution of the State of Utah, U.C.A. 78-2-2(3)(j) and Rule 3(a) of the Utah Rules of Appellate Procedure. This court has jurisdiction over this appeal pursuant to U.C.A. Sec. 78-2-2(4) because the judgment appealed from has been transferred to the Utah Court of Appeals for disposition.

NATURE OF PROCEEDING

Defendant's Motion for Stay of Execution against the Plaintiff pursuant to the provisions of 78-23-13 U.C.A. (1953)(as amended), was denied by the Third District Court, Hon.

Sandra Peuler. Judge, presiding, on January 2, 2003. Defendant/Appellant appeals from that Order and requests that this Court grant the injunction, and remand the matter to the lower court for further proceedings to award damages for violation of the statute.

#### STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue I: Did the District Court commit reversible error by refusing to grant an order for a stay of execution in favor of Defendant/Appellant and against the Plaintiff/Appellee pursuant to the provisions of the Utah Exemptions Act, 78-23-13 U.C.A. (1953)(as amended) where the Plaintiff-Creditor was executing upon Defendant-Debtor's personal injury proceeds which are exempt pursuant to 78-23-5(ix) U.C.A. (1953) (as amended) contrary to the provisions of Exemptions Act.

Standard of Review: The District Court's ruling on the effect of the Utah Exemptions Act constitutes an interpretation of the statute, which is a question of law. The ruling of the District Court will be reviewed for correctness. Trench Shoring Services v. Saratoga Springs Development, 457 Utah Adv. Rep. 8 (Utah CA 2002);

Issue II: Did the Third District Court commit reversible error by refusing to exercise its jurisdiction and apply the Utah Exemptions Act where both parties were domiciled in Utah, and the judgment was entered in Utah, where the Plaintiff-Creditor-Appellee was proceeding to execute upon Debtor's personal injury proceeds by way of an independent action brought in Clark County, Nevada, where the proceeds of the personal injury settlement were located.

Standard of Review: The District Court's ruling on the effect of the Utah Exemptions Act constitutes an interpretation of the statute, which is a question of law. The ruling of the District Court will be reviewed for correctness. Trench Shoring Services v. Saratoga Springs Development, 457 Utah Adv. Rep. 8 (Utah CA 2002);

### CONSTITUTIONAL OR STATUTORY PROVISIONS

The Due Process Clause and Full Faith and Credit Clause of the Constitution of the United States is relevant to the determination of the choice of law issues in this appeal.

The following Utah statutes are relevant to the determination of the issues raised by this appeal:

U.C.A. 78-23-5. Property exempt from execution.

(1) (a) An individual is entitled to exemption of the following property:

- (i) a burial plot for the individual and his family;
- (ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;
- (iii) benefits the individual or his dependent have received or are entitled to receive because of disability, illness, or unemployment from any source;
- (iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or his dependent to pay for that care;
- (v) veterans benefits;
- (vi) money or property received, and rights to receive money or property for child support;
- (vii) one clothes washer and dryer, one refrigerator, one freezer, one stove, one microwave oven, one sewing machine, all carpets in use, provisions sufficient for 12 months actually provided for individual or family use, all wearing apparel of every individual and dependent, not including jewelry or furs, and all beds and bedding for every individual or dependent;
- (viii) works of art depicting the debtor or the debtor and his resident family, or produced by the debtor or the debtor and his resident family, except works of art held by the debtor as part of a trade or business;
- (ix) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another

individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;

(x) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(h), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e) of the United States Internal Revenue Code of 1986, as amended; and

(xi) the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those terms are defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended.

(b) The exemption granted by Subsection (1)(a)(x) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p) of the United States Internal Revenue Code of 1986, as amended; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy.

(2) Exemptions under this section do not limit items which may be claimed as exempt under Section 78-23-8.

78-23-13. Injunctive relief, damages, or both allowed against creditor to prevent violation of chapter -- Costs and attorney's fees.

An individual or the spouse or a dependent of the individual is entitled to injunctive relief, damages, or both, against a creditor or other person to prevent or redress a violation of this chapter. A court may award costs and reasonable attorney's fees to a party entitled to injunctive relief or damages.

#### STATEMENT OF THE CASE

Defendant's Motion for Stay of Execution against the Plaintiff pursuant to the provisions of 78-23-13 U.C.A. (1953)(as amended), was denied by the Third District Court, Hon. Sandra Peuler, Judge, presiding, on January 2, 2003. A copy of the Order is attached hereto and made a part hereof.

Plaintiff obtained a Default Judgment against the Defendant dated April 11, 2001, and filed on April 17, 2001, in the Third District Court of Salt Lake County, State of Utah. R.15-16.

On November 8, 2002, the Plaintiff, by and through Brent Larsen, Esq. of Las Vegas, Nevada, filed a Complaint against Defendant in Clark County, Nevada, seeking "the appointment of a receiver to take possession of the proceeds of a settlement of another lawsuit in favor of defendant, which are in the hands of the defendant's Las Vegas, Nevada attorneys." R.23-25. The plaintiff's Complaint alleges that he is entitled to "carry the Utah judgment into effect," and refers specifically the Default Judgment rendered herein.

On November 12, 2002, plaintiff, by and through his attorney Brent Larsen, filed an Application for Appointment of Receiver and obtained an Ex Parte Order for Appointment of Receiver. R.30-31. The Affidavit from attorney Brent Larsen alleges, at paragraph 3, "I am informed and believe that Mr. Fox is about to receive payment of a settlement in a **personal injury case** (emphasis added) entitled Ken Fox v. Stratosphere Gaming Corp., Case No. A393903. The Affidavit further identified Mr. Fox's attorney of record, and requested that the receiver be appointed to take possession of the sum of \$36,500.00 that may come into the possession of his attorneys. R. 33-35.

On December 11, 2002, Defendant Fox filed a Motion for Stay of Execution and Memorandum in Support of the Motion in the Third District Court in the instant case. Plaintiff filed a Memorandum in Opposition for Stay of Execution of Judgment on December 31, 2002. R.17-21. The matter came on regularly for hearing on January 2, 2003, the Hon. Sandra Peuler, Judge presiding.

After argument of counsel, the Court denied the Motion. An Order was signed and entered on January 29, 2003. R.46-47. This Appeal was filed February 27, 2003.

### STATEMENT OF FACTS

The following facts are uncontroverted.

1. On December 8, 2000, plaintiff's complaint was filed in this case in the Third District Court in Salt Lake County. That complaint alleged that "Plaintiff and Defendant are residents of Salt Lake County, State of Utah." R. 1.

2. Plaintiff obtained a judgment by default entered April 17, 2001, in the Third District Court. R.15-16.

3. In November 2002, when plaintiff filed his complaint in Nevada, Fox was a resident of and was domiciled in the State of Utah, and plaintiff McCulloch was a resident of and domiciled in the State of Utah.

4. The facts alleged in plaintiff's original lawsuit involved matters occurring during October 1999, and all events alleged therein occurred in the State of Utah.

5. The money in the possession of defendant's Las Vegas attorneys was obtained as a consequence of the settlement of the lawsuit between Appellant Fox and the Stratosphere in Las Vegas, and consists entirely of proceeds from the settlement for damages for personal injuries.

6. The proceeds of the personal injury settlement were in the hands of Mr. Fox's Las Vegas attorneys and defendant Fox was entitled to receive those proceeds from his attorneys at the time those attorneys were served with the plaintiff's Nevada action in November 2002.

7. The Nevada action was brought by the plaintiff to "carry the Judgment into effect", i.e. the Utah judgment in this case.

8. Under Utah law, personal injury proceeds are exempt property of a debtor.

9. Under Nevada law, personal injury proceeds are not exempt property.

### SUMMARY OF ARGUMENT

Argument I: The Utah Courts have jurisdiction to enforce the Utah Exemptions act where the judgment was obtained in the Third District Court, Salt Lake County, State of Utah, and where both parties are residents of Utah and domiciled in Utah. The Utah Court does not lack subject matter jurisdiction to enjoin a Utah creditor from pursuing exempt property of the debtor located in another jurisdiction. The mere fact that the exempt property of the Debtor is located in Clark County, Nevada, does not divest the Utah Courts of jurisdiction.

Argument II: The Utah Courts should apply Utah substantive law pursuant to constitutional choice of law principles, and not the substantive law of the foreign jurisdiction where the property of the debtor is physically located. Utah is the state with the dominant interest in the proceedings and should apply Utah law, and not Nevada law, regarding the determination whether property of a debtor is exempt from execution by a general creditor. The Utah Court of Appeals should reverse the decision of the lower court and enter its Order to enforce the provisions of the Utah Exemptions Act and grant injunctive relief and damages in favor of the Defendant/Appellant.

### ARGUMENT I

THE UTAH COURT HAS JURISDICTION TO ENFORCE THE UTAH EXEMPTIONS ACT  
AND GRANT AN INJUNCTION AND DAMAGES AGAINST A UTAH JUDGMENT  
CREDITOR PURSUANT TO THE PROVISIONS OF 78-23-5(ix), U.C.A. AND 78-23-13,

U.C.A. WHERE BOTH PARTIES ARE DOMICILED IN UTAH AND THE JUDGMENT IS A  
UTAH JUDGMENT

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. The last clause of the open courts provision guarantees that an individual may "prosecute or defend[ any civil action] before any tribunal in this State," so long as the individual is a party to the suit. Utah Const. art. I, § 11.

In Applied Medical Technologies, Inc., Plaintiff, v. Eames, 2002 Utah LEXIS 24,\*;2002 UT 18; 44 P.3d 699;440 Utah Adv. Rep. 14 the court ruled on matters involving enforcement of judgments in Utah. Rule 69(b) of the Utah Rules of Civil Procedure provides, "A writ of execution may be used to levy upon all of [a] judgment debtor's personal property and real property which is not exempt from execution under state or federal law. [\*7] " Utah R. Civ. P. 69(b). Accordingly, under rule 69(f) of the Utah Rules of Civil Procedure, a sheriff or constable, pursuant to a writ of execution, may levy upon the nonexempt property and sell it at a sheriff's sale.

The defendant/appellant appeals from the decision of the District Court denying his request for injunctive relief to protect his exempt property. The plaintiff filed an action to enforce his Utah judgment in the State of Nevada. Plaintiff asserted that the Utah court lacked subject matter jurisdiction. The lower Court apparently believed that it should not tell a Nevada



Court what to do in the pending action. The lower court apparently believed that the matter should be deferred to the discretion of the Nevada court, and on that ground refused to grant the defendant the injunctive relief requested against the plaintiff. Tr.10-11.

The proceeds of a personal injury settlement constitute exempt property and is not subject to being attached by a general judgment creditor of the debtor. The proceeds of a personal injury settlement are exempt property where the defendant is a resident and has his domicile in Utah. The Utah Courts have jurisdiction to enforce the Utah exemptions statute where the parties are all residents of Utah and are properly before the Court. Where a judgment creditor seeks to attach the property of a debtor located in another state, the laws of Utah regarding exempt property must be enforced by the Utah Court.

The plaintiff in the lower court did not dispute that the funds he was seeking to levy upon constituted proceeds of a personal injury settlement in favor of the defendant. Neither did the plaintiff dispute the fact that the defendant was a resident of Utah at the time of the service of the complaint to enforce the Utah judgment in Nevada in November 2002. The plaintiff continues to be a resident of Utah. All events which formed the factual basis for the plaintiff's lawsuit against the defendant occurred in Utah. The plaintiff had no connection whatsoever with the Nevada courts until he filed his action under Nevada law for the appointment of a receiver to take possession of the proceeds of the defendant's personal injury settlement proceeds prior to the same being disbursed to defendant by his Nevada attorneys.

Defendant seeks an Order of this Court enforcing his rights to have his exempt property protected from a judgment creditor. Where both parties are residents of the State of Utah, and

the judgment is a Utah judgment, any post judgment actions are properly within the jurisdiction of the Utah Courts.

Rule 69 (b) U. R.C.P. establishes the procedure to enforce a judgment through a writ of execution. It specifically allows a creditor to levy upon a debtor's non-exempt property, and provides for a hearing to determine the property of a debtor claimed as exempt.

Rule 69. Execution and proceedings supplemental thereto.

(a) Availability of writ of execution. A writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a judgment debtor.

(b) Property subject to execution. A writ of execution may be used to levy upon all of the judgment debtor's personal property and real property which is not exempt from execution under state or federal law.

The proceedings instituted by plaintiff in Nevada, although characterized as a Complaint to appoint a receiver, has as its essential purpose an attempt to execute upon and seize the personal property of defendant. The result will be essentially the same as if the plaintiff had obtained a Writ of Execution in Utah. The actions of plaintiff in Nevada are, in effect, executing upon a Utah judgment in foreign jurisdiction.

The plaintiff's position at the hearing on the Motion for Stay was set forth in his Memorandum. He argues that "Even if the Utah courts did have jurisdiction, which they do not, the Utah court would have to apply the law of Nevada, since Nevada is where the cause of action and the proceeds are located. Nevada does not exempt actions for execution on personal injury proceeds" R.40-42. In other words, the plaintiff's position is that because Fox's claim against the Stratosphere occurred in Nevada and the money from that settlement was still in Las Vegas, that

both the courts in Utah and Nevada would be required to apply Nevada law with respect to determining exempt property.

The cases cited by plaintiff in the lower court do not support his position. Glezos v. Frontier Investments, 896 P. 2d 1230 (Utah. App. 1995) has nothing to do with the facts of the instant case. That case simply stands for the proposition that the Court of Appeals does not have jurisdiction to consider an untimely filed cross-appeal under Utah R.App.P. 10(a). However, that case is relevant to this appeal, in that it establishes that the provisions of Rule 10 are permissive, and not mandatory, and therefore this Court has jurisdiction to hear this Motion.

The other two cases cited by the plaintiff in the lower court for the proposition that the Utah court lacked subject matter jurisdiction are similarly not at all in point. As a matter of fact, Crump v. Crump, 821 P.2d 1172 (Utah App. 1991) and Curtis v. Curtis, 789 P.2d 717 (Utah App. 1990) involved a determination of continuing jurisdiction for child custody purposes in domestic cases, where there was a conflict between the provisions of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act. Those decisions stand for the proposition that the state where original child custody decree was entered had continuing exclusive jurisdiction over custody issues, and held that a party may not voluntarily divest the court of such jurisdiction, even though a party could waive personal jurisdiction and proceed to litigate in a different state. The defendant herein submits that those cases similarly do not support either the plaintiff's position or the decision of the lower Court. On the contrary, the basic principles of continuing jurisdiction in child custody matters on the part of the original

Court is similar to the instant case, in that this Court retains jurisdiction to decide issues arising out of post-judgment remedies.

The plaintiff's claim in this case had no connection with Nevada. None of the parties were Nevada residents at the time that the action accrued. None of the events alleged in plaintiff's complaint occurred in Nevada. At the time the defendant made his motion for a stay he was undisputedly a resident of Utah.

## ARGUMENT II

UTAH COURTS SHOULD APPLY THE UTAH EXEMPTION ACT PURSUANT TO CONSTITUTIONAL CHOICE OF LAW PRINCIPLES WHERE THE JUDGMENT WAS ENTERED IN UTAH AND PARTIES ARE UTAH RESIDENTS NOTWITHSTANDING THE FACT THAT THE PROPERTY CLAIMED AS EXEMPT BY THE DEBTOR IS LOCATED IN ANOTHER STATE

The United States Supreme Court in Allstate Insurance Co. v. Hague, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) held that in order to comport to the standards of the full faith and credit and due process clauses of the United State Constitution, that the substantive law of a state must be applied in a constitutionally permissible manner. The state must have a significant contact, or a significant aggregation of contacts, to create a state interest such that the choice of that state's law is neither arbitrary or fundamentally unfair. There is nothing in the way of significant contacts that would give this plaintiff the benefit of the Nevada exemption statutes (which do not exempt personal injury proceeds) when the parties are both residents of Utah, and the judgment of this plaintiff was obtained in the Courts of Utah.

The Court stated: "

In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, n10 this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. See *Clay II, supra*, at 183. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, see *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 542 (1935), the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction. n11.

The opinion further sets forth the public policy considerations involved in constitutional choice of law issues.

The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 271-272 (1980) (plurality opinion); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-277 (1935). n7 The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. The Clause does not, however, rigidly require the forum State to apply foreign law whenever another State has a valid interest in the litigation. See *Nevada v. Hall*, 440 U.S. 410, 424 (1979); *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 546-548 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501-502 (1939). n8 On the contrary, in view of the fact that the forum State is also a sovereign in [\*38] its own right, in appropriate cases it may attach paramount importance to its own legitimate interests. n9 Accordingly, the fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. Rather, in my opinion, the Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State. n10

The dissenting opinion, by Justice Powell states the constitutional principles as follows:

Both the Due Process and Full Faith and Credit Clauses ensure that the States do not "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444

U.S. 286, 292 (1980) (addressing Fourteenth Amendment limitation on state-court jurisdiction). As the Court [\*57] stated in *Pacific Ins. Co., supra*: "[The] full faith and credit clause does not require one state to substitute for its own statute, *applicable to persons and events within it*, the conflicting statute of another state." *Id.*, at 502 (emphasis added). The State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy. In short, examination of contacts addresses whether "the state has an interest in the application of its policy in this instance." Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in B. Currie, *Selected Essays on the Conflict of Laws* 188, 189 (1963) (Currie). If it does, the Constitution is satisfied.

The provisions of the Restatement of Law, (Second) Conflicts of Law Sec. 132 further supports the position of appellant/defendant.

"The local law of the forum determines what property of a debtor within the state is exempt from execution unless another state, by reason of such circumstances as the domicile of the creditor and the debtor within its territory, has the dominant interest in the question of exemption. In that event, the local law of the other state will be applied."

This was the principal point argued by the defendant in the lower court. These principles are established law, and have been adopted in many jurisdictions in the United States. The debtor's exemptions should be determined pursuant to Utah law, and not Nevada law, because both parties are residents of and domiciled in Utah and Utah is the state of dominant interest in these proceedings. The local law of the state of dominant interest should be applied to determine whether the property of the defendant is exempt from execution.

The lower Court denied the motion, and was of the opinion that this Court would be somehow telling a Nevada Court what to do with a case filed in Nevada. Judge Peuler stated:

Thank You. Here's my ruling. I'm going to deny the motion for stay because while the Nevada Court may well decide that Utah law applies, I think it's their call. The proceedings to attach the funds were filed in Nevada. The funds are in Nevada, and I think that Court is the one that has to decide whether or not the funds can be attached.

There are no funds here; they are located in a different state. I do think if I said the funds are exempt I would be telling the Nevada Court what to do with their lawsuit that's filed there. So---and that certainly I don't have jurisdiction to do. So I'm going to deny the motion for stay because I believe that appropriately has to be sought in Nevada." Tr. 10-11.

The decision of the lower Court appears to rest upon the concept that because the money was not physically present in Utah, that the matter of granting a stay based upon a determination of whether the attached property was exempt or not, and whether to apply Nevada or Utah law, would be the decision up to a Nevada court. The lower Court essentially simply declined to make a decision as to whether or not the personal injury proceeds were exempt, and denied the debtor/defendant his statutory remedy. Appellant/defendant respectfully submits that this ruling constitutes reversible error by the lower Court.

The defendant's position is that pursuant to the provisions of 78-23-13, U.C.A., he is entitled to an order of this Court enjoining the plaintiff personally from a further violation of that chapter. He argued that the Utah court has jurisdiction to enjoin the plaintiff, and thus there was nothing of substance for the Nevada Court to decide, since the proceeding in Nevada is simply an action to execute upon the Utah judgment. In other words, the relief that the defendant was requesting was simply that the Utah Court protect his rights and enter an order preventing the further violation of the Utah Exemptions Act by the plaintiff.

Plaintiff and defendant are both domiciled in Utah. The full faith and credit clause of the Constitution of the United States requires that the exemptions statute of Utah be applied. Personal injury settlement proceeds are specifically exempt from execution by a general creditor.

It is well established that a debtor may seek an Injunction against a plaintiff to enjoin proceedings in foreign jurisdictions. "An injunction may be used, where a creditor is within the jurisdiction and amenable to the court's process, to restrain the creditor from seizing or selling the exempt property in the foreign state or from proceeding to judgment and execution on an assigned claim." See 31 Am. Jur. 2d . Exemptions. Sec. 336-337. See also cases collected at 6 A.L.R.2d at pp. 905-908 regarding the availability of an injunction for actions brought in another state.

Generally injunctive relief provides the only adequate and complete protection for the beneficiaries of the exemption laws. See Uniform Exemptions Act Sec. 17, citing 31 Am. Jur. 2d Exemptions Sec 173-190 (1967). However, sometimes both an injunction and damages, including costs and attorney fees will be appropriate.

The United States Bankruptcy Court in the District of Colorado considered the choice of law principles in case involving similar facts. The Court held that under Colorado choice of law rules, Colorado's rather than Iowa's exemption statute would be applied to determine whether debtors residing in Colorado were entitled to exempt interest in annuity contract obtained by debtor in Iowa as part of settlement of personal injury action; though creditor's judgment against debtor was also obtained in Iowa, Colorado had dominant interest in seeing that its residents did not become charge upon State. In re Pederson, 105 B.R. 622 (Bkrcty.D.Colo.1989).



The Court in Pederson, infra, found that Colorado has adopted the Restatement (Second) of Conflict of Laws when resolving choice of law issues. The general rule as set out in Sec. 132 is that the law of the forum is controlling as to the exemption of property from execution unless some other state has the dominant interest. The Court cited 3 Collier on Bankruptcy 522.06, which states that the law of the debtor's domicile shall govern exemptions, even if the law of the domicile is different from the law of the forum.

Since the forum and domicile of the debtor was Colorado, and the Court applied Colorado law and ruled that the annuity obtained as a personal injury settlement was exempt. That case states with particularity the public policy considerations upon which exemptions are based, and one of the most important is that the debtor should not be left destitute by his creditors to become a public charge. Thus, the residency of the debtor is one of the principal reasons for the application of the exemption laws of a particular state where there is more than one state with some contact with one or more of the parties.

Exemption rights in bankruptcy are determined as of the time of the bankruptcy filing. 11 U.S.C. Sec 522(b)(2)(A). The state of residency and domicile of the debtor determines what property is exempt, where the state has opted out of the amended federal bankruptcy exemptions statute, (which both Utah and Nevada have done.) Utah law determines what property is exempt for a Utah resident. The appellant/defendant is undisputedly a Utah resident for purposes of bankruptcy jurisdiction. If the courts of Utah fail to enforce its exemption statute, the obvious recourse for such debtors is to seek relief in the United States Bankruptcy Court. Under bankruptcy practice, the Bankruptcy court would enforce the automatic stay against any state

court proceedings by this creditor in the courts of Utah or Nevada, or any other state where there is property of the debtor.

In Colorado, proceeds of personal injury settlements are exempt. In this case, should it make a difference for purpose of determining exemptions policy that a Utah debtor may have his proceeds attached by a Utah creditor in Las Vegas but not in Denver. Or, what would be the effect if the Utah debtor had Utah counsel in an out-of-state action for personal injuries and the settlement money was paid to his counsel in Utah. The actual physical location of personal injury settlement proceeds should not be the principal factor in determining whether the funds are exempt from creditors, and the decision of the lower court to that effect is clearly contrary to law.

Utah law is very specific. Pursuant to the provisions of 78-23-5(ix) U.C.A. (1953) (as amended) property is exempt where such property constitutes the "proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual.....to the extent that those proceeds are compensatory." It is not disputed that the money that the plaintiff seeks to attach is a personal injury settlement. The plaintiff, through the affidavit of his attorney acknowledges that the defendant's case against the Stratosphere was for "personal injuries." The settlement funds in the present possession of Mr. Fox's attorneys of record are entirely compensatory, and are for the bodily injury suffered by Mr. Fox. as a consequence of the negligence of the Stratosphere.

Utah Exemptions Act specifically protects the proceeds of a "settlement for bodily injury" from execution by a general creditor. The plaintiff is a general creditor, and he had no

connection whatsoever with the defendant's lawsuit in Nevada against the Stratosphere. He was not involved in that case in any way. His claims against this defendant related exclusively to events that had taken place in Utah. The file and record in this case do not reflect that the plaintiff had ever made an effort to execute on his Utah judgment until November 2002.

The plaintiff's actions in commencing an action in Nevada for the Appointment of a Receiver is in violation of the Utah Exemptions Act. He is attempting to seize and levy on the exempt property of the debtor. The plaintiff's argument that because the money is in the hands of debtor's Nevada attorneys, and not physically present in the State of Utah, that the Utah Court lacks subject matter jurisdiction, and therefore may not grant the defendant the relief he seeks is not supported by existing legislation or relevant case law. In addition, his position is simply bad public policy. Defendant respectfully submits that under choice of law principles the Utah Exemption law applies and should be appropriately enforced by this Court.

In Homeside Lending, Inc v. Miller 2001 UT App 247;31 P.3d 607;428 Utah Adv. Rep. 6;2001 Utah App. LEXIS 64 this court dealt with issues arising under the Utah Exemptions Act. As to the issues and standard of review, the court stated:

In the present matter, the parties have stipulated that there are no disputed questions of fact. Accordingly, we afford the trial [\*6] court's legal conclusions no particular deference, but review them for correctness. See *Lefavi v. Bertoch*, 2000 UT App 5, PP14-15, 994 P.2d 817; *Rotta v. Hawk*, 756 P.2d 713, 714 (Utah Ct. App. 1988).

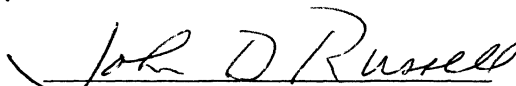
## CONCLUSION

WHEREFORE, defendant respectfully submits that the defendant is entitled to the relief as follows:

1. That this Court determine that the proceeds of the personal injury settlement in the present possession of defendant's Las Vegas attorneys constitutes property of the debtor which is exempt from execution pursuant to Utah law;
2. That the Court enforce the provisions of the Utah Exemptions Act and issue its Order enjoining this Plaintiff personally, including his attorneys, assigns or agents, from proceeding in Nevada or elsewhere to attempt execution upon the aforesaid exempt property of the defendant;
3. For his costs of court, damages according to proof, reasonable attorney fees, and for such other and further relief as may appear to the court to be just and equitable in the premises.

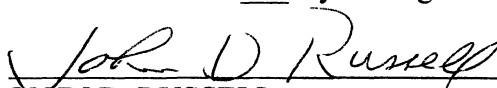
Respectfully submitted,

Dated this 22 day of August 2003.

  
JOHN D. RUSSELL  
Attorney for Appellant/Defendant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant/Appellant was served upon the plaintiff by mailing said copy, postage prepaid, and addressed to plaintiff's attorney of record, J. Kent Holland, Anderson & Holland, 623 East First South, P. O. Box 11643, Salt Lake City, Utah 84147-0643 this 22 day of August 2003.

  
JOHN D. RUSSELL



JOHN D. RUSSELL  
Attorney for Defendant  
10 West Broadway, Suite 500  
Salt Lake City, Utah 84101  
Telephone: (801) 322-0312  
FAX: (801) 363-8438

IN THE THIRD JUDICIAL DISTRICT COURT  
COUNTY OF SALT LAKE, STATE OF UTAH

---

DAVID McCULLOUGH,	)	
Plaintiff,	)	AFFIDAVIT OF KEN FOX
vs.	)	
KEN FOX,	)	Civil No. 000909958
Defendant.	)	Judge: Sandra N. Peuler

---

STATE OF UTAH    )  
                          ss.  
County of Salt Lake    )

COMES Now Ken Fox, who, being first duly sworn upon oath deposes and says  
as follows:

1. My name is Ken Fox.
2. I am the defendant in the above-captioned matter.
3. That I have read and am familiar with the matters set forth in my Motion for Stay of Execution of Judgment and Memorandum in Support of Motion.
4. The factual matters set forth in the Motion and Memorandum are true and correct to the best of my knowledge, information and belief.

5. That the money that the plaintiff is seeking to obtain by his lawsuit filed in the District Court of Clark County, Nevada, constitutes the proceeds of a personal injury settlement in my favor in the matter captioned Ken Fox v. Stratosphere Gaming Corp., Case No A393903. The settlement remains in the possession of my attorney of record in that case, Eckley M. Keach of Las Vegas, Nevada.

6. I understand that the proceeds of a personal injury settlement are exempt property pursuant to the Utah exemption statute, 78-23-5 U.C.A. (1953) (as amended).

7. I am presently a resident of Salt Lake County, State of Utah. I was a resident of Utah at all times material to the allegations contained in the Complaint of the Plaintiff and the Default Judgment he obtained. The Plaintiff is a resident of Utah, and has been at all times material to this case.

8. I was not a resident of Nevada when the injuries occurred at the Stratosphere, nor was I a resident of Nevada when the plaintiff filed his Complaint against me in their Case No. A458944.

9. I hereby state that the proceeds of the settlement are for bodily injury that I sustained as a result of being stabbed in the back at the Stratosphere in 1998.

Further your affiant sayeth not.

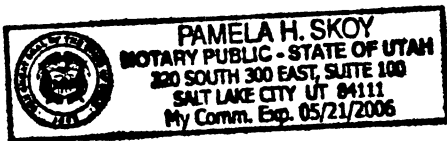
Dated this 8 day of May 2003.

  
KEN FOX

VERIFICATION

Before me personally appeared Ken Fox, who, being first duly sworn upon oath deposes and says that he has read and is familiar with the matters set forth in the foregoing Affidavit of Ken Fox, and that the matters set forth therein are true and correct to the best of his knowledge, information and belief.

Dated this 8 day of May 2003.



My Commission Expires:

5/21/06

A handwritten signature in cursive script, appearing to read "Pamela H. Skoy", written over a horizontal line.

Notary Public  
Residing at Salt Lake City, Utah



**AFFIDAVIT OF ECKLEY M. KEACH**

STATE OF NEVADA       )  
                                  ) ss.  
COUNTY OF CLARK       )

ECKLEY M. KEACH, being first duly sworn, deposes and says:

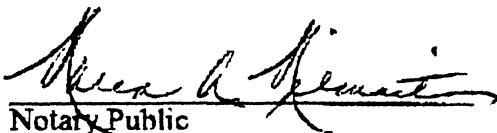
1. I am an attorney licensed to practice law in the State of Nevada and in that regard represented defendant Ken Fox in a personal injury matter in the Eighth Judicial District Court in Clark County, Nevada styled Ken Fox v. Stratosphere Gaming Corp., a Nevada corporation d/b/a Stratosphere Tower Hotel & Casino; Jorge Delcarmen Cruz, an individual, et al., Case No. A393903.

2. Attached hereto is plaintiff Ken Fox's settlement statement to The Honorable Jack Lehman, District Court Judge of Clark County, Nevada, dated October 28, 2002. This statement was submitted to Judge Lehman for purposes of a settlement conference on October 31, 2002 and details Mr. Fox's bodily injury claims as a result of an incident at the Stratosphere Hotel in Las Vegas on June 8, 1998. Mr. Fox's personal injury action resolved as a result of the settlement conference.

FURTHER AFFLIANT SAYETH NAUGHT.

  
ECKLEY M. KEACH

Subscribed and sworn to before me  
this 23 day of December, 2002

  
Notary Public

